UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

AMERICAN FEDERATION FOR CHILDREN, INC.

and **Cases 28-CA-246878**
28-CA-262471

SARAH RAYBON, an Individual

Katherine E. Leung, *Esq.*. for the General Counsel.
Tyler J. Freiberger, Esq. (Centre Law & Consulting, LLC),
for the Respondent-Employer.

DECISION

Statement of the Case

ARIEL L. SOTOLONGO, Administrative Law Judge. At issue in this case is whether American Federation For Children, Inc. (Respondent or AFC) violated Section 8(a)(1) of the Act by discharging, or constructively discharging, Sarah Raybon (Raybon), because she engaged in protected concerted activity, and whether Respondent violated Section 8(a)(1) and (4) of the Act by retaliating against Raybon because she filed Board charges or gave testimony or evidence related to those charges. Also at issue is whether Respondent violated Section 8(a)(1) of the Act by making coercive or otherwise unlawful statements, and by enforcing rules in its employee handbook in an unlawful manner or for an unlawful purpose.

I. Procedural Background

Based on charge in Case 28—CA—246878 filed by Raybon on August 16, 2019, and on a charge and amended charge in Case 28—CA—262471 filed by Raybon on June 30, 2020 and August 28, 2020, respectively, the Regional Director of Region 28 of the Board issued a consolidated complaint on September 1, 2020, alleging that Respondent had violated the Act as described above. In light of the restrictions required by the current COVID-19 pandemic, I conducted a video hearing in this matter via the Zoom video platform on March 2 through March 5, 2021.

II. Jurisdiction

The parties (counsel for the Acting General Counsel and Respondent) stipulated that at all material times Respondent has been a California nonprofit corporation exempt from taxation under Section 501(c)(4) of the Internal Revenue Code, with its principal office and place of

business in Washington, D.C., where it has been engaged in advocating and lobbying for school choice. The parties also stipulated that in conducting its business operations during the 12-month period ending August 16, 2019, Respondent derived gross revenues in excess of $250,000, and that during the same time period Respondent performed services valued in excess of $50,000 in States outside the District of Columbia. Finally, the parties stipulated, and I find, that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 2.)

III. Findings of Fact

A. Background Facts

As briefly described above, Respondent is an organization dedicated to the promotion of education reform nationally, and more specifically, the promotion of school choice for families. Together with other similarly-minded organizations, it lobbies state and local governments, as well as private institutions or sources, for financial or other material support to provide families with access to schools of their choice, be they public or private. Besides its headquarters in Washington, DC, Respondents employs staff members in several States, including Arizona, where Raybon was located and where many of the events at issue in this case took place. Respondent's national management team, during all material times, were: John Schilling, President; Lindsey Rust, National Implementation Director; Jennifer Miller, Chief Financial Officer; and Darrell Allison, National Director of State Teams.[1] These managers were all based in Washington, DC, except for Rust, who was based in Ohio.

Respondent's (full-time) Arizona contingent, through the end of 2018, consisted of Raybon, who was Arizona director of implementation; Sydney Hay, who is Raybon's mother, was its lobbyist;[2] and Kim Martinez was Arizona communications director, although she also had some national responsibilities as a National Correspondent.[3] Sometime during the first week of January 2019, Respondent hired Steve Smith, a former Arizona state senator, as its Arizona state director, and as such he became the direct supervisor of the Arizona team.[4] The events that followed Smith's hiring as Arizona state director, as described below, is at the heart of the dispute at issue in this case.

[1] The parties stipulated that all of these individuals were Sec. 2(11) supervisors and Sec. 2(13) agents of Respondent. Additionally, the parties stipulated that Steve Smith, who became Arizona state director in early January 2019, as discussed below, was a Sec. 2(11) supervisor and Sec. 2(13) agent of Respondent. Additionally, the parties also stipulated that Tim La Sota, outside counsel for Respondent in Arizona, was a Sec. 2(13) agent of Respondent (GC Exh. 2). Finally, also part of the national managerial team was Greg Block, Respondent's CEO, and as such presumably a supervisor/agent of Respondent, but the parties did not stipulate to this.

[2] Hay was a contractor/consultant, and as such not an employee of Respondent.

[3] Part of the Arizona team were also canvassers, but apparently these were not full time. It is not clear if they were part time employees, casual employees, or contractors.

[4] Prior to Smith's hiring, Raybon reported directly to Rust, who was based in Ohio, while Martinez and Hay reported to others at headquarters. Thus, the Arizona team appears to have operated semi-autonomously, with no immediate local supervision.

B. The Events of January 2019[5]

Sometime during the 1st week of January, Smith held a "get acquainted" meeting of the Arizona team that he now supervised. The meeting was held at a local restaurant (California Pizza Kitchen), since Respondent has no office space in Arizona and team members work remotely out of their homes. Present at the meeting were Smith, Raybon, Martinez, and Hay. Raybon testified that during the meeting, which she recalled occurred on January 2, each of the team members generally discussed what projects they were working on, and what their goals were. As part of her discussion, Raybon mentioned the team of canvassers that worked under her guidance or auspices, including Gabby Ascencio, the head canvasser who Raybon said was currently on "leave."[6] Martinez', Hay's, and Smith's recollection of the meeting was generally similar, with a slight difference in the case of Smith and Martinez.[7] Following the meeting, according to both the testimony of Raybon and Hay, a conversation took place between them and Smith outside the restaurant, on their way to their cars. According to Raybon, she brought up the subject of Ascencio, attempting to convey to Smith her importance to the organization, and said that the process of re-hiring her was "almost over." Raybon got the impression that Smith did not understand Ascencio's importance—or why job was being held for her, a concern that would impact Raybon's future course of actions, as described below.

Raybon testified that a few days later, on January 8, Rust emailed her a copy of an application she had received for the position being held for Ascencio. The application was submitted by a former campaign staffer for Smith, which caused Raybon to suspect that Smith was attempting to undermine Asencio's sponsorship, the "safety" of which Raybon was now concerned about, she testified.[8]

On January 11, Smith held his now regularly scheduled weekly staff meeting with the Arizona team via conference call. Smith, Raybon, Hay, and Martinez were the participants. Raybon testified that Smith said he had concerns about a certain portion of the Spanish website, and wanted to take that page down. He mentioned that the Spanish website stated that

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[5] All dates hereafter shall refer to calendar year 2019, unless otherwise specified.

[6] Ascencio had left Respondent's employment in 2017, when she lost her work permit in the United States apparently due to her divorce and resulting change in her immigration status. She was highly regarded by AFT management and the Arizona team, according to the testimony of Schilling and others, and accordingly AFT begun the process of sponsoring her so she could obtain a work permit. As part of this process, AFT had to "post" her job to allow others to apply. When, apparently, no suitable candidates emerged, the position was "closed" in April 2018 and AFT was able to "hold" the position for her until the application process was completed, a process that apparently took a lot longer than anyone expected. Thus, as of early 2019 Ascencio had not yet received her work permit and had not been re-hired by AFC. As discussed below, Ascencio's status played a prominent role in the events that were to follow.

[7] Smith, who was called as an adverse witness under FRE 6(11)(c) by the General Counsel, recalled, after reviewing his affidavit, that there was a discussion about Respondent's English and Spanish website. According to Smith, prior to his hire, there had been a controversy regarding the Spanish website, which contained a message to the effect that immigration status would not be raised when applications were submitted for scholarships—language that was apparently not used in the English version of the website. According to Smith, a decision had been made that both websites should use the exact same language, without any reference to immigration status. Martinez also recalled that the issue with the websites had been discussed, with Smith saying that both websites should contain the same language.

[8] For his part, Smith denied that he had anything to do with his former's staffer's application. There is no need for me to make any credibility resolutions as to this issue, as it is ultimately immaterial to the issues at hand.

immigration status was not a factor (for scholarship applicants), and he did not want immigration status mentioned at all. Raybon testified that when she pushed back, explaining that the immigrant community should be informed of their rights, Smith replied that "we need to treat Hispanics like white people."[9]

On January 14, Raybon called Rust, her former direct supervisor (prior to Smith's hiring), to express her concerns about the status of Ascencios' (future) job, in light of the recent events, as described above.[10] Rust told Raybon that she would check into Ascencio's status and get back to her—but Raybon did not hear back from Rust. A couple of weeks later, Raybon phoned Bruce Hermie, the Director of Private School Partnership for AFC, a national-level official of Respondent, although he is located in Arizona.[11] Raybon testified that she called Hermie to seek his advice because he was a very experienced "old hand" at AFC, and they had good rapport. She told Hermie about her concerns about Ascencio's job status, and her concerns about "Hispanic outreach." The latter concern was exacerbated by Raybon's recent discovery that a few years earlier Smith, as an Arizona State senator, had sponsored legislation which Raybon considered to be "anti-immigrant."[12] Raybon also told Hermie that it had become difficult for her to work with Smith, because he would be "dismissive" toward her, often talking over her.

On January 30, Raybon testified, Smith called her and said that she was no longer to contact the national AFC staff, that "everything had to go through him."[13]

C. The Events in February

On February 15 a weekly staff conference call was held with the Arizona team. Participating in the call were Smith, Raybon, Hay, Martinez, La Sota (outside counsel), and James Klein, a consultant who did legislative for AFC. The main topic discussed on this call involved a recent committee meeting in the state legislature which Raybon and Hay had attended. Both Raybon and Hay testified that Smith had instructed Hay, through Martinez, to

[9] I do not credit Raybon's testimony in this regard. As a witness, I found Smith to be articulate and possessed of a professional demeanor that, in my view, makes it highly unlikely that he would have used such crude terms to describe what he wanted done regarding the website. I credit Smith's testimony that what he said was that the English and Spanish websites should contain identical language, and inasmuch the English version did not contain any language about immigration status, neither should the Spanish website. Indeed, the emails exchanged between Smith, Raybon (and Martinez) on this subject, support this conclusion. (GC Exh. 57.) Although Smith believed this conversation occurred at the first meeting in the restaurant, whereas Raybon testified that it occurred a week later during a conference call, this is a distinction without a difference. I note that Martinez' testimony corroborated Smith, and that Hay, who also took part in this conversation, did not address this issue in her testimony.

[10] Raybon testified that she told Rust her concerns regarding the job application they had received from Smith's former staffer, and concerned about the remarks regarding the website that Smith had allegedly made and how that would impact the outreach to the Hispanic community.

[11] It is not clear if Hermie is a Sec. 2(11) statutory supervisor, since the record is silent on that issue, but based on Raybon's testimony it appears he is a national-level "official" with AFC, who is not part of the Arizona team, despite the fact that he resides there.

[12] A copy of this legislation, Arizona Senate Bill 1445 (2012), was introduced into the record by the Acting General Counsel (GC Exh. 42).

[13] Smith did not recall this conversation, and thus did not specifically deny it (Tr. 388). I thus credit Raybon on this issue. In this regard, Raybon testified that "previously," she would contact national staff routinely. While no doubt true, I would note that previously Raybon did not have an immediate, direct supervisor in Arizona, which she now did in Smith.

phone him on her cell phone during the committee meeting so he could listen in to what was being said and could in turn instruct Hay on what to say to the legislators. Hay had previously raised ethical objections with AFC management regarding alleged conduct by Smith which she believed to be in violation of anti-lobbying Arizona laws.[14] During the conference call, Raybon testified, she asked La Sota whether Smith directing Hay to let him listen to the committee meeting through her phone could be considered "lobbying." Apparently, before La Sota could answer, Smith instructed him to get off the call, and the call soon ended after Martinez and Smith denied that this occurred.[15]

A much more significant event, in the sense of the results it would engender, occurred a few days later, when AFC staffers met in Washington, DC, for their annual conference. On February 19 Raybon traveled to Washington, DC, landing At Reagan National airport. Prior to her departure, Raybon had communicated with Valeria Gurr, AFC's Nevada state director, with whom she was acquainted, and arranged to meet her at the Washington airport so they could share a cab to the hotel where they were staying during the conference.[16] According to Raybon, once she and Gurr boarded the cab, she told Gurr how difficult things were going for her in Arizona. Raybon said she was concerned about Ascencio, and about the changes in (AFC's) Hispanic outreach and in the Spanish language website. She told Gurr about the legislation that Smith had sponsored in the Arizona senate, and how he wanted to get rid of the Spanish website, and had said that Whites should be treated like Hispanics. According to Raybon, when they arrived at the hotel, while in Gurr's room (where Raybon apparently followed her), Gurr told Gurr to "be careful," with tears in her eyes.

Gurr's account of her encounter with Raybon, and what Raybon had said to her, was not only different, but far more detailed. Gurr testified that when she encountered Raybon at the airport, she was very upset, even agitated. On their way to their hotel, Raybon told her she was very upset with the Arizona state director, Smith, whom Raybon said "did not like people of color." Raybon told her about her concerns regarding Ascencio, and about the anti-immigrant legislation that Smith had sponsored. Gurr testified that she felt very uncomfortable with this conversation, because she did not know Smith and felt this was not the time or place to speak about race matters. Part of her discomfort stemmed from the fact that she is a Hispanic woman, and she felt Raybon was trying to gain her support for her "mission," which Gurr surmised was getting Smith fired. Gurr advised Raybon, "as a friend, not a colleague" to take her concerns to

[14] By way of background, Arizona law prohibits former legislators, following their departure from the legislature, from engaging in lobbying of legislators for a period of 1 year. Hay had reported to AFC management that she had issues with some of Smith's alleged actions regarding his former colleagues, and AFC had retained the services of attorney La Sota to advise AFC management (and the Arizona team) as to whether Smith was engaging in conduct that might violate antilobbying laws. On February 10, La Sota issued a memorandum addressed to Schilling and Allison, discussing Smith's conduct and concluding, in essence, that Smith had done nothing unlawful, including telling others what to say to legislators (which presumably addressed the cell phone allegation). (GC Exh. 10.) Schilling testified that La Sota's memo was shared with Hay, but not Raybon.

[15] Presumably, as discussed in the footnote above, La Sota would have answered Raybon's question in the negative, in light of his February 10 memorandum. Hay testified that Smith "went ballistic" during this call, apparently because Hay (and Raybon, presumably) were questioning his conduct or authority.

[16] Much testimony was dedicated to the immaterial issue of how long Raybon waited at the airport for Gurr to arrive from Nevada. Raybon testified that it was about 45 minutes, whereas Gurr believed it may have been as long as 2 hours. What is clear is that Raybon very much wanted to meet with Gurr, so she could talk to her about the issues discussed below.

her supervisors, which probably meant upper management, since Smith was Raybon's direct supervisor. According to Gurr, after they arrived at the hotel, and were at a reception, she repeated her allegations about Smith to others sharing their table, telling others that Smith was a "racist" or that he did not like people of color—and bringing up the legislation he had sponsored.[17] Burr could not identify the AFC individuals at their table, since she did know their names, but testified there were two individuals from Louisiana and one from Tennessee.[18]

Regarding her interaction with other AFT staffers at the hotel and during the conference, Raybon testified that she told others, while sitting together, that she was concerned as what was happening in Arizona regarding Smith, citing her concerns about Ascencio, the Spanish website and its impact on outreach, and Smith's sponsorship of legislation which she said was very "anti-undocumented immigrants." One of the individuals she expressed these concerns to was Kelli Bottger, the Louisiana State Director, because Raybon believed her to be close to AFC President Schilling. Another of the individuals Raybon discussed her concerns with was Calvin Lee, who works with grassroots outreach in Wisconsin (his exact title of position, unknown), who she told about Smith's attempts to "de-rail" Ascencio's sponsorship and his anti-undocumented immigrant legislation. Raybon also spoke to Hergit Llenas, commonly known at AFC as "Coco," the National Community Outreach Director, to whom she repeated the above concerns, and Michael Benjamin (position unknown), who joined during Raybon's conversation with Llenas.[19]

On February 21, Raybon had a meeting at AFC's headquarters in Washington, DC, with AFC President Schilling and CFO Miller, in Schilling's office. Raybon testified that Schilling began the meeting by asking her why she had been "trashing" Smith, adding that it had been reported that she was calling him a "racist." Schilling also added that she had violated the employee handbook by doing so, although he did not specify which provision(s) of the handbook she had violated. Raybon, who claimed she was startled by this, denied that she had "trashed" Smith, but stated that she had concerns about his stand on some issues, explaining that she was concerned that he had tried to undermine Ascencio by having someone apply for her job, and about his stand on Hispanic outreach and the Spanish language website. She also added that Smith was difficult to work with, was demeaning and dismissive, and had not allowed her to contact the National staff, telling her that everything had to go through him.

[17] Pressed by counsel and well as myself as to whether Raybon had specifically used the term "racist" to describe Smith, Gurr insisted that Raybon had indeed used that term, but testified Raybon had also repeatedly said Smith "did not like people of color." In her testimony, Raybon specifically denied ever using the term "racist" to describe Smith, but did not deny saying he didn't like people of color—which, in my view, is saying the same thing in a different way. Indeed, it is apparent that Raybon truly came to believe that Smith was biased against immigrants, based on her perception of his attitude toward Ascencio (and her prospective employment), of her perception of what Smith wanted to do regarding the Spanish language website, and on her interpretation of the legislation Smith had sponsored years before. Although, as I discuss below, I find this conclusion was supported by the thinnest of reeds, it is apparent that she believed it and that such belief guided her actions. I therefore I conclude it is more likely than not that she used the term "racist" in describing Smith to others. Even if she didn't, however, I find she did say that he did not like people of color—which is tantamount to calling him a racist.

[18] Gurr testified that she pulled AFC President Schilling aside to report what Raybon was saying about Smith, and later confirmed to him, when he called her to inquire, that Raybon had called Smith a racist.

[19] During this conversation Raybon also said that Smith had said that "whites" should be treated like Hispanics.

Schilling's version of what occurred at this meeting did not significantly differ from Raybon's account, except that he provided more details. He testified that he called Raybon to the meeting because 3 individuals, "Coco" Llenas, Gurr, and Martinez, had reported that Raybon had been calling Smith a racist. Schilling asked if that was true, adding that calling someone a racist was a form of harassment in violation of the "personnel manual" (i.e., the employee handbook).[20] Raybon denied calling Smith a racist, but admitted saying that he had sponsored legislation that was hostile to Hispanics, and that he had solicited resumes for the position being held for Ascencio, conduct which she considered to be "anti-Hispanic." Raybon also added that she had concerns about Smith's leadership style, that he spoke to her in a disrespectful manner. Schilling responded that AFC would not tolerate such disrespect, and would talk to Smith about it. Raybon told Schilling that she did not want him to talk to Smith, that she would handle it herself. Schilling added that the employee handbook called for employees to take problems with immediate supervisors to upper management, so they could address the problem.[21] The meeting ended shortly thereafter, and Raybon returned to Arizona later that day, since the conference had concluded.[22]

On February 23, Smith sent Allison an email, in which he informed Allison that he had heard from 2 AFC staffers ("Coco" Llenas and Martinez) that Raybon told them and others that he was a racist. In essence, Smith demanded that AFC management investigate and take action, including discharge, against Raybon (and Hay, whom Smith believed was conspiring with Raybon to damage his reputation), and threatening legal action if these corrective measures were not undertaken (GC Exh. 38).[23] Allison forwarded the email to Schilling on the same day, according to Schilling's testimony.[24] Schilling testified that following his receipt of the forwarded Smith's email, he spoke to 6 AFC staffers to ask them about what Raybon had said to them regarding Smith. The staffers were Llenas, Gurr, and Martinez, who had initially approached Schilling to report about Raybon' statements, and Justin Morales, Calvin Lee, and Michael Benjamin, whom the first 3 mentioned as having also heard Raybon's comments. Apparently, these staffers confirmed that Raybon had accused Smith of being a racist.

Schilling testified that at this time, after consulting with other AFC managers, he decided to terminate Raybon, whom Schilling believed had created a "toxic atmosphere" within AFC by

[20] In that regard, Schilling testified that he explained to Raybon that leveling a "false accusation" about her supervisor being a "racist" was inappropriate. (Tr. 192.)

[21] Schilling made a reference to the "Open Door" provision in the handbook (GC Exh. 6).

[22] CFO Miller, who was also present at this meeting, briefly testified about the meeting, and her description of the events generally followed the contours of Schilling's account, without adding or detracting anything. As I indicated above, Raybon's and Schilling's account of the meeting did not vary in a significant way, except that Schilling's description of the meeting was far more detailed than Raybon's. I thus credit Schilling's testimony as being the most accurate, to the extent there is any disparity in their accounts.

[23] In his email to Allison, which can be fairly described as having an angry tone, Smith states that Raybon's conduct was "reprehensible, vile, and slanderous" and amounted to "character assassination" and in violation of AFC's anti-harassment policy in its handbook, which he quoted. Smith testified that he recommended Raybon's termination for the reasons described in his email (Tr. 404). I credit his testimony, which is consistent with his contemporaneous message.

[24] Allison testified that he could not even remember receiving the email from Smith, which is difficult to believe, given the nature of its contents. Allison, who had recently left AFC for another job, gave the impression of someone who would rather be anywhere else but the witness chair—including a dentist's chair, undergoing a root canal. To say that his testimony was not helpful would be an understatement.

labeling Smith as a racist.[25] On February 25, he sent an email to Miller, informing her that after consulting with Brock and Allison, they had decided to terminate Raybon in light of her accusations of racism against Smith (GC Exh. 12). Later on the same day, Schilling sent Raybon an email requesting a conference call that afternoon, to which Raybon agreed (GC Exh.13).

On the afternoon of February 25, Schilling and Miller, in Washington, DC, held a telephonic conference meeting with Raybon, who was home in Arizona. Raybon testified that Schilling began the meeting by telling her that he had spoken to several AFC staffers, who had all confirmed that she had called Smith a "racist." Raybon responded that she had never used such word. Schilling said that she had violated the employee handbook provisions by making such accusations, adding that Smith did not want to work with her anymore, and then asked "what am I supposed to do?" Raybon responded that in that case, she would resign, offering to send her resignation letter that same day. Later that day, Raybon submitted her resignation letter (GC Exhs. 15; 16). Schilling's account was briefer that Raybon's, testifying that he was beginning to inform Raybon of what he had found out pursuant to his investigation of the matter when Raybon offered to resign. Miller testified along the same lines as Raybon, but adding a few additional details. She testified that Schilling told Raybon that AFT staffers had come forward stating that she had accused Smith of being a racist, and that the staffers had been offended, and that she had created a hostile work environment. Miller then testified that Raybon offered her resignation.[26] Following Raybon's resignation, on February 25, Schilling sent Miller and Brock an email describing and summarizing the events that had led to the fateful meeting with Raybon earlier in the day (GC Exh. 20, p. 2).[27]

D. The Events Following Raybon's Resignation

In early March, not long after her resignation from AFC, Raybon began working as Executive Director for Arizona STO Organization, one of several organizations in Arizona which are part of the school choice working group or coalition.[28] Not long after Rayon joined

[25] In making this determination, Schilling testified, he not only considered the incendiary nature of the accusation, but also the fact that it was completely unjustified, given the basis which had been proffered by Raybon: Smith's suspected interference with Ascencio's re-hiring; his views regarding the content of the Spanish-language website; and his sponsorship of allegedly anti-immigrant legislation in 2012.

[26] While the 3 above-described versions of the February 25 conversation vary somewhat, they do not conflict with one another in any significant way. I credit the versions of Raybon and Miller, which were a little more detailed than Schilling's. In that regard, I credit Raybon to the effect that Schilling said that Smith did not want to work with her, and then asked what he was supposed to do. I would note that all 3 versions agree on one fact, which is that Raybon offered her resignation before there was any mention of her being terminated. Indeed, Raybon was never told that she was going to be terminated, or disciplined in any way, during this conversation or at any other point (Tr. 192; 250; 253).

[27] This exhibit also includes a later email, date October 1, from Schilling to Miller, apparently sent in light of a pending Board investigation pursuant to a charge filed by Raybon, in which he again describes the events in February. The February 25 email describes the reasons AFC had decided to discharge Raybon before her resignation made that unnecessary. Those reasons were: (1) her making unwarranted and unproven accusations against Smith (calling him a racist), in violation of the personnel manual, and not reporting an issue with a supervisor through the proper chain of command; and (2) the fact that Smith, because of Raybon's conduct in calling him a racist, no longer wanted to work with her, and as State Director he was entitled to decide who worked in his team, in consultation with management (GC Exh. 20).

[28] Some of the other members of this coalition include: AFC; The Goldwater Institute; Americans For Prosperity; Center For Arizona Policy; Ed Choice; and the Catholic Conference.

Arizona STO, Smith participated with her as part of a coalition taskforce in a series of meetings with Arizona State School Superintendent Hoffman. Nonetheless, both Smith and Schilling testified that AFC considered Hoffman a political opponent who was opposed to many of the goals and programs supported by AFC and many of the members of the school-choice coalition.[29]

On August 8, Smith sent an email to several of the coalition partners, attaching a series of tweets posted by Raybon where she defended Hoffman, an action that Smith criticized as "unbelievable" (GC Exh. 45).[30] Nonetheless, it is notable that this email came at the very tail end of a long chain of emails exchanged between coalition member organizations beginning on July 3, where a meeting between coalition partners was planned for August 7, the day prior to Smith's email about Raybon. Neither Raybon nor any other member of her organization was copied or included in the email chain, and thus they did not participate in the meeting between coalition partners that took place on August 7.[31] On October 2, Matt Beienburg of the Goldwater Institute sent an email to a number of the coalition partners suggesting that they have another planning meeting to discuss their legislative agendas, which was followed by a chain of emails between those who had been initially copied by Beienburg. Again, neither Raybon nor her organization was included in this initial list of invitees (GC Exh. 47). On that same day, Clark, in response to Beienburg's email, responded to the entire group, asking if Ron Johnson and Raybon should be invited. Beienburg replied on the same day, clarifying that he had added Johnson to the list of invitees (but did not mention Raybon). On October 14, Smith emailed the group, suggesting that Justin Olson be invited. On October 15, Beienburg replied to Smith, informing him that it had been suggested that the meeting be limited to those who had attended the prior meeting (on August 7), and that Olson would be consulted later. The meeting apparently took place on October 21, at the Goldwater Institute, and Raybon did not participate.

In February 2020, there were additional exchanges of emails between certain members of the school choice coalition. In one of these exchanges, on February 22, 2020, Cathi Herrod of the Center for Arizona policy, emailed the other coalition members, bemoaning the fact that Sydney Hay and Raybon had not been included in the meetings their group had been having and suggesting that mediation be attempted to resolve any differences—between them and AFC, presumably (GC Exh. 23).[32] Smith, in a separate email to Schilling on February 28, 2020 reports that he had spoken by phone (based on Schilling's advice) to other coalition members about this issue, and that at least one (Jenna Bentley at the Goldwater Institute) had indicated that she would prefer that Smith be on the meetings, if that meant having to exclude Hay and Raybon. While there is no direct written communications in the record from AFC or Smith to members of the coalition suggesting or demanding that Raybon not be permitted to participate in their

[29] For example, Smith testified that Hoffman was "not a fan" of ESA's and STO's, and "not a friend" of what AFC and its allies were trying to promote (Tr. 414–417).

[30] Raybon's tweets are included in GC Exh. 19.

[31] The email chain, inviting a number of coalition partners to plan for a meeting which eventually took place on August 7, originated with W. Michael Clark, an official with the Center for Arizona Policy. Thus, it appears that Clark was the person who decided whom among the coalition partners to invite to plan for this meeting.

[32] In her email, Herrod appears to be more concerned about Hay's absence from the meetings, highlighting the fact that Hay had been the "de facto leader" of the group for many years. It should be noted that Hay resigned her position as consultant/lobbyist for AFC shortly after Raybon resigned. Hay testified she resigned due to her differences with Smith and AFC management regarding Smith's lobbying activities.

meetings, the above evidence indicates that Smith (and AFC) would not participate in any strategy meetings if Raybon was present. Indeed, Smith admitted as much, testifying that he told the coalition members that he would not participate in any meetings with Raybon where legislative strategy was discussed, although he never advocated for her exclusion. Smith explained that Raybon was opposed to legislation AFC and other coalition members supported, and that it therefore made no sense to include someone who amounted to an adversary in their discussions—or as he put it, "be careful on who [sic] you share strategy with" (Tr. 422; 441–445).[33]

On June 19, 2020, Smith emailed Sally Henry, a board member for Arizona STO Association, suggesting that Arizona STO organizations be recruited to join in signing a letter to Congress requesting that private school funding be part of the stimulus package it was considering. Henry forwarded Smith's email to Raybon, Arizona STO Association Executive Director, and informed her that she had advised Smith to contact Raybon directly, since she was the go-to person for Arizona STO in these type of matters (GC Exh. 58). Thereafter, Smith communicated with Raybon to coordinate on this matter.[34]

E. Respondent's Handbook

Finally, it is undisputed that the 2019 and/or 2020 versions of Respondent's employee handbook contained the following provisions:

> **CONFIDENTIALITY**
>
> Each employee is expected to maintain the confidentiality of AFC's internal affairs. Utmost discretion shall be observed in dealing with proprietary information. Information on donors and personnel matters shall not be shared with anyone not employed by AFC, unless authorized by the President. Information on projects in the development stages shall be considered sensitive and not for public dissemination. Any departure from this policy shall be grounds for immediate dismissal. Employees will be asked to sign a confidentially agreement to protect the proprietary information, including but not limited to databases and any information of strategic value to the organization.
>
> **SOLICITATIONS AND DISTRIBUTION OF LITERATURE**
>
> It is the intent of AFC to maintain a proper business environment and to prevent interference with work and inconvenience to others from solicitations and/or distribution of literature.

[33] Emails exchanged between Smith, Schilling and other AFC staff suggest that Raybon's political opposition to some of the legislative agenda supported by AFC was a principal factor driving Smith's (and AFC's) opposition to being part of any strategy meetings if Raybon was included (GC Exh. 25).

[34] In this regard, Smith testified that he has worked and participated in meetings with Raybon, since her departure from AFC, on issues not involving legislative strategy involving ESAs. Raybon admitted that she has worked with Smith since she left AFC, and that was participating on a weekly call with him at the time of the hearing (Tr. 629–630).

Group meetings for solicitation purposes, distributing literature or circulating petitions during work hours or in work areas at any time is prohibited unless it is approved as an organization-sponsored event. The following guidelines will apply throughout the organization:

- Employees will not engage in any solicitation of other employees for any purpose whatsoever during working hours or in work areas.
- The organization's facilities may not be used as a meeting place, which involves solicitation and/or distribution of literature.
- Certain types of information may be posted on AFC's bulletin board. The President or CEO will approve and post all information that is displayed on the organization bulletin board.

EQUAL OPPORTUNITY EMPLOYER

The American Federation for Children (AFC) provides equal employment opportunities to all employees and applicants for employment and prohibits discrimination and harassment of any type without regard to race, color, religion, age, sex, national origin, disability status, genetics, protected veteran status, sexual orientation, gender identity or expression, or any other characteristic protected by federal, state or local laws. This policy applies to all terms and conditions of employment, including recruiting, hiring, placement, promotion, termination, layoff, recall, transfer, leaves of absence, compensation and training.

Any employee who feels that a violation of this policy has occurred should bring the matter to the immediate attention of his or her supervisor. An employee who is uncomfortable for any reason in bringing such a matter to the attention of his or her supervisor shall report the matter to the President, Chief Executive Officer (CEO) or Chief Financial Officer (CFO). AFC will investigate all such allegations and prohibits any form of retaliation against any employee for making such a complaint in good faith. An employee who feels subjected to retaliation for bringing a complaint of harassment or participating in an investigation of harassment should bring such matter to the attention of his or supervisor, the President, CEO or CFO.

OPEN DOOR POLICY

AFC strongly believes in an open-door, open-communication policy and feels it is an important benefit for all employees. This policy, we believe, will allow an employee to come forward and discuss problems with his or her supervisor to resolve issues quickly and efficiently. However, if an employee's supervisor is not able to satisfy the questions regarding the interpretation or application of this handbook or any other work place issue, then employees are free to contact the next higher level of supervision, President and/or CEO, or the Chief Financial Officer. If an employee has or foresees a problem that may interfere with that employee's ability to adequately perform his or her responsibilities, the employee should discuss the matter with the President or his or her designee. (GC Exhs. 6; 7)

In the complaint, the Acting General Counsel alleges that that above-cited provisions of the manual are "overly-broad and discriminatory," as discussed below.

IV. Analysis

As described in the Statement of the Case section at the very outset of this decision, the complaint alleges that Respondent made unlawful statements or engaged in unlawful interrogations, maintained or applied unlawful overly broad rules, discharged Raybon for engaging in protected activities, and thereafter retaliated against her by interfering with or diminishing her professional standing, because she had engaged in protected activities or filed charges with the Board. I will discuss these allegations in that precise order.

A. The Allegations Regarding Unlawful Statements or Interrogations

1. The allegation regarding communicating with the national headquarters team.[35]

This allegation stems from a phone conversation between Smith and Raybon on January 30, when Smith told Raybon that she was no longer to contact the national staff directly, that such communications had to go through him first. According to Raybon's testimony, however, the only "national headquarters" staffer she had contacted prior to this conversation with Smith was Rust, her former supervisor (and admitted 2(11) supervisor),[36] whom she called to inquire about the status of Respondent's sponsorship of Ascencio. I conclude that Raybon was not engaged in protected concerted activity in her communication with Rust, for two reasons. First, this particular communication with Rust, a 2(11) supervisor and thus not a statutory employee, was neither concerted nor protected activity, because Raybon was not raising a group concern but rather her own personal grievance, or concern, about Ascencio's status for future employment.[37] *Alstate Maintenance,* LLC, 367 NLRB No. 68, slip op. at 3 (2019). Moreover, the conversation with Rust about Ascencio, who at the time was not legally authorized to work in the United States and was therefore not a statutory employee, cannot be deemed protected activity. Activity for or on behalf of persons who are not statutory employees are not considered activity for "mutual aid or protection," and thus not protected under the Act. *Amnesty International of the USA, Inc.*, 368 NLRB No. 112 (2019). Thus, even assuming that Smith did not want Raybon to talk to national officers about Ascencio without first obtaining his approval, such prohibition was not unlawful. Smith, the new Arizona State Director and Raybon's immediate supervisor, was apparently attempting to establish a "chain of command" hierarchical protocol for communications with national headquarters, not trying to suppress concerted protected activity—of which there was none, in this instance. Accordingly, I recommend that this allegation be dismissed.

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[35] Par. 4(c) of the complaint, which alleges as follows:

- From about February 20, 2019 to about February 26, 2019, Respondent interfered with the right of its employees to discuss working conditions with employees employed at Respondent's Headquarters or to *concertedly* raise concerns with supervisors employed at Respondent's Headquarters by maintaining a prohibition on employees communicating with its national team, including by telephone or email, which prohibition was promulgated by Steve Smith, by telephone, on January 29, 2019. (emphasis supplied)

[36] GC Exh. 2

[37] Thus, there is no evidence that Raybon had discussed her concerns about Ascencio with other employees at this point.

2. The allegation that Respondent warned Raybon to be careful about expressing concerns.[38]

This allegation stems from a long conversation that Raybon had with Valeria Gurr, Respondent's Nevada State Director, upon their arrival in Washington, DC, for AFC's yearly conference in mid-February. As described in the Facts section, Raybon told Gurr about her concerns about Smith—whom she had described as not liking people of color, or of being a racist. While in Gurr's hotel room, Gurr told to be careful, and to take concerns about Smith to her supervisors. In essence, the General Counsel is alleging that by making these statements Gurr, whom it claims is a 2(11) supervisor (which Respondent denies), Gurr was "interfering" with employees' rights to "concertedly raise concerns with supervisors." I conclude this allegation lacks merit, for several reasons. First, the General Counsel has the burden to establish that Gurr is a 2(11) supervisor, and I am not persuaded that the General Counsel met this burden by the preponderance of the evidence.[39] Assuming, however, that this burden was somehow met, I am not persuaded that under the circumstances described Gurr's statement could be deemed to be coercive. Thus, the facts showed that Raybon beseeched Gurr to listen to her story and concerns about Smith, waiting for her to arrive at the airport, sharing a cab ride to the hotel, and even following her to her hotel room. After Raybon repeatedly accused Smith of being biased or being a racist, Gurr, who was made to feel very uncomfortable by these accusations, told Raybon to be careful *and to take her concerns to her supervisors*—as described by the General Counsel's own brief. Yet, the complaint alleges that by saying this, Gurr interfered with Raybon's right to take her concerns to her supervisors, which is self-contradictory and simply makes no sense. The test as to whether statements are unlawful under Section 8(a)(1) of the Act, is whether such statement(s) can reasonably be said to interfere with the free exercise of employee rights under the Act, by being threatening or otherwise coercive. If an employee could reasonably interpret or construct a statement as threatening or otherwise coercive, such statement would be unlawful. *Double D Construction Group*, 339 NLRB 303, 303–304 (2003); *Concepts & Designs, Inc.*, 318 NLRB 948, 954 (1995), enfd. 101 F.3d 1243 (8th Cir. 1996); *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003). In the above-described circumstances, I conclude that no reasonable employee could conclude that Gurr's statement was coercive or threatening—particularly since she advised Raybon to do the very thing the complaint alleges she interfered with—the right to take her concerns to supervisors. Accordingly, I recommend that this allegation be dismissed.

[38] Complaint par. 4(d).

[39] In that regard, the General Counsel argues (in its brief) that Gurr has the authority to effectively recommend hiring because the one person Gurr recommended for hiring, an individual named Edgar, was hired. However, Edgar was interviewed by Allison, Gurr's superior, before he was hired, so Respondent did not rely solely on Gurr's recommendation. This does not show that Gurr had the authority to effectively recommend hiring. On the other hand, Gurr was Nevada State Director, a position equivalent to that of Smith in Arizona, an admitted 2(11) supervisor. The General Counsel, however, did not produce evidence showing that the State Director in one State had the same authority as that of another state, something that I cannot simply presume, reasonable as that presumption may be. It is the General Counsel's burden to so establish.

3. The allegation that Respondent, through Schilling, promulgated an unlawful interpretation of its Equal Opportunity Employer and Open Door Policies.[40]

This allegation centers around comments that Schilling made to Raybon during the meeting he and Miller held with Raybon in Washington, DC, on February 21. As discussed in the Facts, after Raybon had described her concerns and issues with Smith, Schilling told her that the Employee Handbook called for employees to bring such type of problems to management's attention, so that management could address them, citing the Open-Door Policy. The General Counsel argues that this statement was unlawfully coercive, because embedded is those words was the implied message that employees should take those problems *solely* to management, rather than discuss them with other employees—as the Act gives them the right to do, for mutual aid and protection. In that regard, I note that neither Raybon nor Schilling (nor Miller) testified that Shilling ever said that such problems should *only* be discussed with management, rather than with fellow employees.[41] Thus, the General Counsel's theory of a violation rests solely on the premise that such statement was reasonably implied. I conclude that such implication cannot reasonably be made under the totality of the circumstances here, and that the General Counsel's theory of a violation goes a bridge too far. Accordingly, I recommend that this allegation should be dismissed.

4. The allegation that Schilling created the impression that Raybon's protected activity was under surveillance.[42]

As with the prior allegation, this allegation also stems from a statement Schilling made to Raybon during their February 21 meeting. Based on reports he had received from employees, Schilling started the meeting by saying he had been informed that she had been calling Smith a "racist," and asked if that was true.[43] The General Counsel argues that since Schilling did not reveal the source of the information, this statement unlawfully created the impression of surveillance. I disagree. As correctly noted by the General Counsel, the test of whether an employer has unlawfully created the impression of surveillance is whether the employee could *reasonably* conclude from the employer's statement or conduct that his/her protected activities had been placed under surveillance. *Dignity Health d/b/a Mercy Gilbert Medical Center*, 370 NLRB No. 67, slip op. at 9 (2021); *Greater Omaha Packing Co., Inc.*, 360 NLRB 493, 495 (2014) (emphasis supplied). It is also true that such an unlawful impression is created when an employer informs an employee that it knows of his/her protected activity without disclosing the source of this information. *Dignity Health, supra.*; *Conley Trucking*, 349 NLRB 308, 315 (2007). In those cases, however, the employee(s) in question had been discreet, even stealthy, while engaging in protected activity, so it came as a true surprise when the employer revealed it knew what the employees were up to. In this case, Raybon's activities were neither discreet nor stealthy. She repeatedly approached various employees and other AFC staffers, in public settings and during group gatherings, and openly spoke about her views regarding Smith, in a rather noticeable manner. In such circumstances, it would not have been reasonable for Raybon

[40] Complaint Par. 4(e)(2).
[41] In any event, to the extent that their versions of this conversation differ, I credited Schilling's version as being more thorough and accurate.
[42] Complaint par. 4(f)(1).
[43] This comes from Shilling's version of their conversation, which I credited.

to conclude, when Schilling asked if she had been calling Smith a racist, that Respondent had placed her activities under surveillance. Rather, a reasonable person would conclude in such circumstances that someone had reported her conduct, i.e., "turned her in," which is exactly what occurred in this instance. Indeed, not one but rather several individuals reported her conduct to Schilling. In this instance, the General Counsel appears to be applying the test of whether the impression of surveillance was created in a rigid and mechanical manner, rather than analyzing the context and the surrounding circumstances. Accordingly, and in view of the above, I find no merit in this allegation, and recommend that it be dismissed.

5. The allegations that other Schilling statements to Raybon during the February 21 meetings constituted threats of unspecified reprisals.[44]

These allegations again stem from the above-described February 21 meeting. The General Counsel points out that during this meeting Schilling accused Raybon of "trashing" Smith, and told her that she had violated the Employee Handbook, without citing any specific section. The General Counsel argues that these two statements represent unspecified unlawful threats of disciplinary action, in response to Raybon's protected activity. I disagree, for the following reasons. First, I would note that I credited Schilling's account of what transpired during the February 21 meeting, to the extent that his and Raybon's accounts differed, and thus I did not credit Raybon's testimony that Schilling said that she had been "trashing" Smith. Rather, I found that Schilling began the meeting by asking Raybon whether it was true that she had been calling Smith a "racist," which Raybon denied doing, but which I concluded most likely she had done.[45] Even assuming that Schilling had accused Raybon of "trashing" Smith, however, I do not find the use of term to have amounted to an unlawful unspecified threat, under the circumstances. As discussed above, the test in determining whether a statement is coercive is an objective one, whether such statement(s) can reasonably be said to interfere with the free exercise of employee rights under the Act. Schilling was investigating multiple reports from other employees that Raybon had openly called Smith a racist, a term that can fairly be labeled as offensive and incendiary, and could reasonably be viewed as misconduct. Thus, Schilling was not criticizing Raybon's arguably protected activity in reaching out to other employees for support, but rather signaling that Raybon's use of the term "racist" to describe Smith was improper and went too far. There is accordingly no nexus between Raybon's protected activity—her reaching out to other employees—and Schilling's scolding of Raybon, which was strictly limited to her use of the term "racist" to describe Smith.[46] I therefore find that it cannot be reasonably concluded that Schilling's alleged statement interfered with the free exercise of employee rights under the Act. Accordingly, I recommend that these allegations be dismissed.

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[44] Complaint pars. 4(f)(2); 4(f)(g)

[45] I would also note that in the complaint ¶ 4(f)(g) alleges that Schilling accused Raybon of being "inappropriate" and "unprofessional" during the February 21 meeting. No witness, including Raybon, however, testified that Schilling used such terms. Accordingly this allegation must be dismissed.

[46] While the General Counsel did not explicitly say so in its brief, it clearly implies that employees are free to make *any* accusations they wish against their employer or its supervisors, so long as they believe it to be true and share their opinions with other employees and are therefore shielded by the Act. I find this expansive view of protected activity troubling, and not supported by Board and court precedents. Without getting into an unnecessarily lengthy recitation of Board law, I would cite the example of an employee who disparages the employer's products or image while discussing his/her working conditions with fellow employees, conduct which the Board has repeatedly found to be unprotected.

6. The allegation that Schilling interrogated employees about their protected activity.[47]

This allegation centers on phone calls that Schilling allegedly made to six (6) employees, to wit, Martinez, Gurr, Llenas, Justin Morales, Calvin Lee, and Michael Benjamin, on or about February 25. This allegation relies primarily on the testimony of Schilling, who testified that he phoned the above-named employees on or about February 25 after Allison forwarded him a copy of the email sent by Smith in which he complained of being slandered by Raybon's accusations of being racist (GC Exh. 38). Schilling testified that he phoned the six employees to get more details about what Raybon had said to them, and that they confirmed that Raybon had called Smith a racist. The General Counsel alleges these phone calls as unlawful interrogations about their protected activities or those of others—presumably Raybon's. There are several problems with this allegation, but first a primer about the factors the Board considers in determining whether there has been an unlawful interrogation. In determining whether an unlawful interrogation has occurred, the Board looks at whether under all the circumstances, the interrogation reasonably tends to restrain, coerce or interfere with the rights guaranteed by the Act. Relevant factors in that determination include: the nature of the information sought; the identity of the questioner; the place and method of the questioning; and the truthfulness of the employee's reply to the questioning. *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985); *Medcare Associates, Inc.*, 330 NLRB 935, 939 (2000).

In considering the above factors, I note the following facts: first, Gurr and Martinez testified that *they* initially approached Schilling to inform him about Raybon's conduct, and Schilling testified that Llenas initially approached him with such information—something undenied by Llenas, who did not testify. Thus, these employees were the ones who initiated their interactions with Schilling, and the February 25 phone calls to them were mere follow-ups to further confirm what they had already volunteered to Schilling. Moreover, the individuals in questions truthfully—and voluntarily—answered the questions or provided the information sought, which pertained as to whether Raybon referred to Smith as a racist, a possible violation of the handbook rules. In these circumstances, and applying the criteria described above, I conclude the February 25 phone calls to these employees did not "restrain, coerce or interfere" with their Section 7 rights.[48] With regard to Schilling's questioning of the 3 other individuals, Morales, Lee and Benjamin, the issue bears closer scrutiny. The problem, however, is that the only information regarding the "interrogation" of these 3 individuals came from Schilling alone, because these 3 individuals did not testify. Schilling testified that he called these individuals after Gurr, Martinez and Llenas informed him that these individuals had also witnessed Raybon's comments about Smith, or had been approached by her. He asked them what Raybon had said about Schilling, and told them that the allegations against him were unsupported by the facts, that nothing that he had done indicated he was a racist or biased against people of color. These are all the facts on the record regarding these conversations between Schilling and these 3 individuals. Although these facts arguably indicate the possibility of a coercive interrogation, in

[47] Complaint par. 4(h).

[48] Moreover, the General Counsel has argued that Gurr is a 2(11) supervisor, and the facts suggest—based on her position—that Llenas is one as well. If such is the case, there can be no unlawful "interrogation" by the employer in those circumstances.

my view they are insufficient to establish a violation of the Act. The General Counsel bears the burden of establishing a violation by the preponderance of the evidence, and that evidence is insufficient to meet that threshold. We simply do know enough about what transpired and what was said by whom in these conversations to apply the factors discussed above in determining whether restraint, coercion or interference with Section 7 rights occurred. Given the General Counsel's burden of proof, any doubts must be resolved against it—and doubts abound, particularly since the alleged subjects of the unlawful interrogation did not testify. Accordingly, and in view of the above, I recommend that this allegation be dismissed in its entirety.[49]

B. The Allegations Regarding Respondent's Employee Handbook[50]

The complaint alleges that Respondent maintains "overly broad and discriminatory" rules in 4 specific sections of its handbook, namely the "Confidentiality," "Solicitation and Distribution of Literature," "Equal Opportunity Employer," and "Open Door" sections, duplicated above in the Facts section. These individual sections will be discussed below.

1. The Confidentiality Section

The General Counsel's objection to this rule focuses on the portion that requires employees to maintain the confidentiality of Respondent's "internal affairs," including "personnel matters," which the rule prohibits sharing with anyone "not employed by AFC." The General Counsel argues that such rules "expressly" prohibits employees from sharing any information "including working, hours, and working conditions" with third parties such as unions, government agents or entities, and the press, activities that are protected under the Act. As such, the General Counsel argues that the rule is so broad as to be facially unlawful under Category 3 of the Board's framework under *Boeing Co.*, 365 NLRB No. 154 (2017). Contrary to the General Counsel, however, I do not agree that rule "expressly" prohibits employees from discussing wages hours and working conditions with third parties, but arguably does so by implication. Accordingly, this rule must be analyzed under the Boeing framework.[51]

Under *Boeing*, I must first determine whether a facially neutral rule, reasonably interpreted from the employees' perspective, would potentially interfere with the exercise of Section 7 rights. In this regard, I conclude that this rule does. The stated purpose of the rule is to protect the confidentiality of Respondent's "internal affairs," a term that is vague as to its meaning—but not necessarily misleading by itself. The rule then goes on directing discretion in dealing with "proprietary information," a term that might be crystal clear to patent or copyright attorneys but not the average worker. Even at this point, it may be argued, a reasonable employee may discern that the employer is trying to protect truly confidential information. The rule, however, goes on to state that information on "personnel matters" cannot be shared with others not employed by AFC. I find that a reasonable employee would conclude that "personnel

[49] In Complaint par. 4(g), the General Counsel alleges that about February 25, Schilling threatened employees with unspecified reprisals for engaging in protected concerted activities. No evidence was introduced to support this allegation, and it is therefore dismissed.

[50] Complaint par. 4 (b) (1) &(2), and 4 (e)(1) (A) & (B).

[51] Indeed, the General Counsel erroneously analyses the rule, in that the *Boeing* framework only applies to *facially* neutral rules. If the rule expressly bans protected activity, as argued by the General Counsel, it is still unlawful under *Lutheran Heritage Village Livonia*, 343 NLRB 646 (2004).

matters" would likely include wages, hours and working conditions, and that as such the rule prohibits sharing that information with third parties. It is for this reason that I find that the rule, as written, would potentially interfere with Section 7 rights

I mut now proceed, under *Boeing*, to determine whether such rule is lawful or not, by balancing the nature and extent of the potential impact on Section 7 rights against legitimate justifications associated with the rule-viewed from the employees' perspective. Again, I find that the potential impact of this rule on Section 7 rights is significant, and outweighs the legitimate justifications of the rule, which is, presumably, to protect truly confidential information. While protecting truly confidential information is justified and an important goal, such goal could have been easily accomplished not necessarily by drafting the rule more narrowly, but rather by being more explanatory or expansive in making it clear that employees are not being prohibited from discussing certain things with third parties—such as wages, hours and working conditions. In making this observation, I am not ignoring the Board's admonition against reading the rule out of context, as instructed by the Board in *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2–3 (2019). Nor am I reading a particular phrase of the rule in isolation, as the Board warned against doing in *Interstate Management CO., LLC*, 369 NLRB No. 84, slip op. at 4 fn. 10 (2020), and *Bemis Co., Inc.*, 370 NLRB No. 7, slip op. at 3 (2020). To the contrary, it is when read in full context that the impact of the rule on Section 7 rights becomes magnified and apparent. Thus, employees are expected to maintain the confidentiality of "internal affairs," using discretion in dealing with "proprietary information," such as "personnel matters." To a reasonable employee, this means that discussing with third parties wages, hours and working conditions, which any reasonable individual would understand to be encompassed under "personnel matters," is to share "proprietary information" and to divulge "internal affairs." I thus conclude that the "reasonable employee" described by the Board in *LA Specialty Produce*, supra., as one possessing common sense, self-reliance and team spirit, would likely play it safe upon reading the above-quoted rule, and refrain from discussing wages hours and working conditions with outside parties, lest he/she violate the rule.

It is for these reasons that I conclude that the rule does not fall under "Category 1(b)" and thus lawful to maintain. Rather, I conclude that these circumstances and facts place this rule in Category 2 under *Boeing*, requiring further scrutiny. I note in that regard that the only business justifications in the record are those contained in the rule itself, and that no explanation was provided or testimony proffered explaining why the rule is written in the rather clumsy manner that it is. In my view, the General Counsel has met its initial burden to prove that this facially neutral rule, when read in its full context, would be interpreted by a reasonable employee to interfere with his/her Section 7 rights. The burden then switches to the employer to show that the business justification for the rule outweighs its degree of infringement on Section 7 rights. I conclude that Respondent has not met this burden. In so concluding, I note that the reasonable goal of protecting confidential information cannot be an impenetrable shield that allows careless, if unintentional, infringement on employee Section 7 rights. The rule could—and should—have been written in a manner that made clear that employees were still allowed to discuss certain "personnel matters," such as wages, hours and working conditions, with third parties. Such goal could have been accomplished not by writing the rule in a narrower manner, but rather in a *broader*, more expansive manner. I find the Board's rulings in cases dealing with too narrowly-written "escape clauses" in arbitration agreements to be analogous to this situation. In those

cases, the Board has found a violation where the arbitration agreement infringed on the rights of employees by appearing to limit their right to bring statutory claims before the Board or other government entities, as is their right to do. The Board held that the sin in those cases was the scope of the language, which in context appeared to limit employee rights, a sin that could have been cured by simply adding "savings" language that explicitly carved out an exception to bringing cases before the Board or other similar governmental entities. See, e.g., *Century Fast Foods, Inc.*, 370 NLRB No. 4 (2020); *CBRE, Inc.*, 368 NLRB No. 152 (2019).[52]

Accordingly, and for the above reasons, I conclude that the language of the Confidentiality clause of Respondent's employee handbook violates Section 8(a)(1) of the Act.

2. The Solicitation and Distribution of Literature Section

At issue is the portion of the rule that prohibits "solicitation of other employees for any purpose during *working hours. . . ."* It is by now axiomatic under well-established Board precedent that employers may prohibit solicitation during working *time*, but not during working *hours,* which would presumably include breaktimes and other non-working times, during which employees are allowed to engage in activity protected by Section 7. *Our Way, Inc.*, 268 NLRB 394 (1983). Accordingly, this overbroad prohibition is presumably invalid, and no *Boeing* analysis is required. *UPMC Presbyterian Shadyside*, 366 NLRB No. 142 (2018).

In light of the above, I find that this section of Respondent's employee handbook violates Section 8(a)(1) of the Act.

3. The Equal Opportunity Employer and Open Door Policy Sections

In the complaint, the General Counsel alleges that these Sections, as worded and *maintained*, are overly broad and discriminatory.[53] In its brief, the General Counsel sings a different tune, conceding that these employee handbook sections are lawful under step 1 of the *Boeing* analysis. I agree. Instead, the General Counsel argues that these rules were unlawfully "promulgated" by Schilling during his February 21 meeting with Raybon, when he allegedly told her that she should have brough her complaints about Smith directly to management, as directed by the employee handbook, rather than discussed them with other employees.

First, it should be noted that the General Counsel should have amended its complaint to reflect its new theory, prior to the submission of briefs, but did not. This is unfair to Respondent, as it misdirected its arguments on brief to address the language of the sections, which the General Counsel belatedly conceded (on brief) were lawful, and prevented Respondent from

[52] Indeed, I would note that the scope of the language in this and other similarly-worded employee handbooks can represent a more present and realistic threat to employee rights under Section 7 than do restrictively-written arbitration agreements. This is because in the vast majority of cases, employees sign arbitration agreements that are never to be seen again, let alone remembered, and which may only surface if and when an employee attempts to bring a cause of action outside of such agreement. Employee handbooks, on the other hand, govern the day-to-today conduct of employees at work, are usually readily available for review, and are often used as justification for discipline. The existence of such potentially unlawful restrictive rules in a handbook therefore represent more immediate and present dangers to such rights than safely-tucked away arbitration agreements.

[53] Complaint par. 4(e)(1).

addressing what the General Counsel now argues is the true violation. While this may not be fatal to the General Counsel's allegations, because all the facts were litigated at trial, it does not reflect well on the General Counsel. I will now address the merits of the General Counsel's belated theory of a violation.

As discussed in the Facts section, I found that Schilling told Raybon that she had violated the employee handbook, although he did not cite which specific section of the handbook when he did.[54] Although he did mention the "open door," section at one point, it was in the context of telling Raybon that she should have brought her concerns to management. The facts do not show that Schilling ever told Raybon, as alleged by the General Counsel, that she should have brough her complaints to management *rather than* to other employees, which would arguably have been a violation of Section 8(a)(1). At most, considering the context of the conversation, Schilling simply told Raybon she should have brought her concerns to management, and I find nothing unlawful about that. Accordingly, I find no merit in the General Counsel's belated theory of a violation, and recommend that the allegation be dismissed.

C. The Termination of Raybon's Employment

At the outset, it is important to note that the above heading is worded the way it is, rather than "Respondent's discharge of Raybon," because the facts make clear that Raybon resigned her employment. In its brief, the General Counsel half-heartly concedes as much, but nevertheless argues in its brief that Raybon was actually discharged although Respondent never said so, but intended it, and argues in the alternative that Raybon was "constructively discharged." I will discuss the merits of these theories below, but I would again note that the General Counsel did not amend its complaint to reflect its constructive discharge theory, as it should have. To be fair, however, during its opening arguments the General Counsel did mention that as an alternative theory, it would argue that Raybon was constructively discharged, so Respondent was on notice and had full opportunity to litigate all the facts.

In a nutshell, the General Counsel argues that Raybon was engaged in protected concerted activity when she discussed Ascencio's situation with Rust, Gurr, and with others; that she was involved in protected concerted activity when she discussed her concerns about Smith's (perceived) views about undocumented immigrants and his treatment of her with the above-named individuals and others; that Respondent had animus toward her because she engaged in the above-described protected activity; and that Respondent discharged her at least in part for engaging in these activities, or constructively discharged her by making her continued employment so unbearable or unpleasant that she had to resign.

As both the General Counsel and Respondent correctly point out, the above-described allegation(s) must be reviewed under the *Wright Line* analytical framework.[55] Under this framework, the General Counsel has the initial burden to prove, by preponderance of the evidence, that Raybon engaged in protected (concerted) activity, that Respondent knew about it,

[54] Indeed, although it is not completely clear, it appears that Schilling may have been referring to the no harassment policy in the handbook, which Smith complained had been violated by Raybon by referring to him as a racist.
[55] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F2d 899 (1st Cir. 1981). Cert. denied 455 U.S. 989 (1982). As discussed below, however, there is another analytical framework that may be applicable under these circumstances.

that Respondent harbored animus based on such protected activity, and that it took an adverse employment action against Raybon, motivated, at least in part, by such animus. If the General Counsel is able to make such a showing, the burden of persuasion shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089; see also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade, by a preponderance of the evidence, that the action would have taken place absent the protected activity. *Dentech Corp.,* 294 NLRB 924, 956 (1989).

For the following reasons, I conclude that the General Counsel did not meet its initial burden under *Wright Line*, and even if it did, Respondent met its burden to show it would have taken the same action even in the absence of protected activity by Raybon. The reasons for the General Counsel's failure to meet its burden are various and multi-faceted, as discussed below.

First, it is not crystal-clear that Raybon was engaged in protected concerted activity. As shown by the evidence, particularly by Raybon's own testimony, Raybon's actions were initially triggered and fueled by her concern about Asencio's return to AFC as a future employee. Ascencio had lost her legal right to work in the United States as a result of her divorce and thus left AFC's employ in 2018, and AFC was attempting to "sponsor" her under U.S. immigration laws to secure her future employment, a process which was by no means guaranteed given the complexities and vagrancies of U.S immigration laws. AFC was thus holding Ascencio's former job "open" pending the resolution of her immigration status, something which Raybon informed Smith about during their first meeting shortly after Smith took the reins as Arizona State Director for AFC. Something about Smith's reaction to that information, perhaps his lack of enthusiasm, triggered undue concern in Raybon's part. This concern grew into outright suspicion when a few days later Raybon learned from her former supervisor, Rust, that a former staffer for Smith had submitted a resume for the position being "held" for Ascencio. Worried about Ascencio, Raybon contacted Rust to inquire about Ascencio's status, and Rust told her she would check into it—but Rust did not get back to her. Raybon next contacted Bruce Hermie, a national-level official of AFC who happened to reside in Arizona. She told Hermie about her concerns regarding Ascencio's job status (which she feared Smith was trying to interfere with), concerns which were by now magnified by Smith's directive that the English and Spanish "outreach" websites should be worded the same.[56] Apparently, in Raybon's mind, this signaled that Smith had a racial bias, or at least a bias against Hispanic immigrants. The final straw in Raybon's "suspicion trifecta" was her discovery that years earlier, when he was a State senator, Smith had sponsored legislation which Raybon considered to be "anti-immigrant." This trifecta apparently morphed in Raybon's mind into a conviction that Smith was a racist, or was biased against people of color. This opinion about Smith, supported only by the slenderest of reeds, colored and guided her subsequent conduct, as discussed below.

Before I proceed to discuss Raybon's subsequent conduct, which eventually resulted in the end of her employment, it is important to note that, contrary to the General Counsel's assertion, I conclude that Raybon's activity regarding Ascencio is <u>not</u> protected concerted

[56] Raybon testified that Smith had said that "whites" should be treated the same as Hispanics. I did not credit this testimony, finding instead that Smith had simply said that the language in both websites should be identical.

activity. As discussed above, at the time, Ascencio was not legally entitled or able to work in the United States, and thus not an "employee" within the meaning of Section 2(3) of the Act. Thus, Raybon's advocacy, or more accurately, expressed concern for Ascencio, a nonemployee, was accordingly not conduct for "mutual aid or protection" within the meaning of Section 7. *Amnesty International of the USA, Inc.*, 368 NLRB No. 112 (2019).[57]

Likewise, I do not find that Raybon's remarks to, or discussions with, others regarding the content of Respondent's websites to be protected activity. The content of the website is akin to an employer's "product," that has little if anything to do with wages, hours or working conditions that employees are entitled to attempt to improve in concert with others, for "mutual aid or protection." Simply put, Respondent has no obligation to discuss the nature or content of its website with employees, either individually or as a group, let alone negotiate with them about it.[58] Thus, even assuming that Raybon's mention of her concern about the website was concerted, it was not protected.

The culmination of the events leading to the end of Raybon's employment occurred during the annual employee conference held by Respondent in Washington, DC, in February. As previously recounted, Raybon waited for Burr, who was flying in from Nevada, at the DC airport, and rode with her in a cab to the hotel where they were staying. Raybon told Gurr that Smith was a racist (or did not like people of color), explaining that she thought Smith was attempting to sabotage Ascencio's return and telling Gurr about the legislation he had sponsored years earlier. Raybon later repeated the same things to others individually or in group settings during the conference.[59] At least 3 of the individuals whom Raybon spoke to, reported her conduct to management, and word reached Smith, who strenuously objected to Allison (and Schilling) about Raybon's characterization of him as a racist—and even threatened legal action if management did not address Raybon's conduct. These events led to the February 21 meeting between Raybon, Schilling and Miller, when Schilling confronted Raybon about what she had been saying about Smith, and culminated in the February 25 telephone conference between them, at which time Raybon announced her resignation.

[57] I am aware that in *Amnesty International*, supra., the Board indicated that the unpaid interns at issue were not employees, inter alia, because they did not receive or *anticipate* economic compensation, inasmuch the employer had never hired them or created that expectation. In Ascencio's case, that expectation might reasonably exist, both because she had previously worked for Respondent and because Respondent was sponsoring her in the hope that she would return to their fold. Nonetheless, I would note that unlike in the case where an employer could instantly transform a "non-employee" into one by simply uttering the magic words "you are hired," Respondent was legally unable to do so in this case given Ascencio's immigration status. At the time of Raybon's inquiries about her, it was by no means certain that Ascencio would obtain the legal ability or right to work in the United States, a process that was totally dependent on a third party—the U.S Government's immigration authorities. In that regard, I would note that the General Counsel's argument that Ascencio was a "statutory employee" merely on a "leave of absence," as if she had been on maternity leave, for example, is disingenuous.

[58] To argue otherwise would be akin to stating that the employees of Coca-Cola, for example, can join together to complain that they don't like the red color of Coke cans, and that such activity would be protected. I can find no support for such view.

[59] Some of the individuals whom Raybon spoke to may have been statutory supervisors, like Gurr (Nevada State Director, whom the General Counsel argues is a supervisor), Bottger (Louisiana State Director) and Llenas (National Community Outreach Director). As such, those conversations may have been neither concerted nor protected.

The General Counsel argues that Raybon's "good faith belief" that Raybon was a racist, or at least was racially biased, even if incorrect, still shielded her conduct, which the General Counsel asserts was protected concerted activity because she shared her views with other employees. I disagree. It is notable that in support of these arguments, the General Counsel cites cases where the Board has found that employees protesting actually discriminatory terms and conditions of employment was protected activity. See, e.g., *Churchill's Restaurant*, 276 NLRB 775, 777 (1985); *Vought Corp.*, 273 NLRB 1290, 1294 (1984), enf. 788 F.2D 1378 (8th Cir. 1986). In other words, employees were protesting conduct engaged in or policies implemented by employers which were discriminatory or racially biased. In the instant case, there isn't a single shred of evidence that Smith actually engaged in any discriminatory conduct or implemented any policies that were discriminatory or biased during his tenure as Respondent's Arizona State Director. Rather, Raybon was concerned that Smith had (as notably argued by the General Counsel on brief) a discriminatory *viewpoint*—a concern based on extremely dubious evidence. Raybon acted on this ill-supported suspicion and publicly accused Smith of being a racist—an incendiary accusation, and one that was justifiably viewed as misconduct by Respondent.[60] Accordingly, I find that in these circumstances Raybon's conduct was neither concerted nor protected.

Even assuming that Raybon' conduct was both concerted and protected, the General Counsel still bears the burden to establish, by the preponderance of the evidence, that Respondent harbored animus against Raybon because of her protected activity, and that this animus was a factor in the adverse action taken against her. On this burden, the General Counsel fails on various fronts. The General Counsel thus argues that Raybon's "conversations with other employees" were the basis for their decision to discharge Raybon, that Respondent's investigation "focused solely" on whether Raybon contacted other employees do discuss Smith's "legislative history," or his statements about Hispanic outreach, or whether Raybon had discussed Smith's "potential anti-immigrant bias or racist bias." These assertions are simply not supported by the record. As I found in the Facts section, Respondent's main focus of its investigation was whether Raybon was going around calling Smith a "racist." There is no evidence that Respondent was the least concerned about whether Raybon was discussing Smith's (remote) "legislative history or potential bias," or anything of the sort with other employees. It's main, if not only, concern was that Raybon was publicly accusing him of being a "racist," creating a toxic working environment. That is how Respondent's inquiry began, when Schilling asked Raybon, during the February 21 meeting, whether it was true that she had been calling Smith a racist.[61] That is how Respondent's inquiry also ended, when Schilling inquired of several employees (3 of whom had voluntarily approached Schilling), whether Raybon had called Smith a racist. Thus, even if Raybon's discussions with other employees was protected activity, there is no evidence of animus directed at, or caused by, those conversations per se. Further, even assuming that some evidence could be extracted from this record indicating that Respondent harbored some animus toward Raybon's protected activity of engaging with other employees, there must be a nexus established between such animus and the adverse action taken against Raybon. *Tschiggfrie Properties Ltd.,* 368 NLRB No. 120 (2019). Once again, the

[60] Indeed, it was some of the very same employees whom Raybon supposedly acted in "concert" with who were so offended by her conduct that they reported her to management.

[61] Even in Raybon's own version of this meeting, which I did not credit, Schilling began the meeting asking her why she had been "trashing" Smith, which would be an apt description of the impact of calling someone a racist.

General fails in its burden of proof on that score, because there is no evidence that Respondent took adverse action against Raybon because of her protected activity (such as discussing Smith with other employees), but rather because she called him a racist during the course of those encounters.[62] Accordingly, I conclude that the General Counsel has failed to meet its burden of proof in this regard.

The final failure of the General Counsel's burden of proof under *Wright Line* has to do with its failure to establish that an *adverse action* was taken by Respondent in the wake of Raybon's alleged protected activity. This is because the facts clearly establish, as detailed above, that Raybon *resigned* from her employment, before Respondent had the chance to discharge her. While it is true that Respondent had every intention to discharge Raybon, as admitted by Schilling and otherwise established in the record, Raybon announced her resignation before Respondent informed her, and before she had any knowledge of Respondent's intention. Accordingly, Respondent did not take any adverse action against Raybon, and Respondent's intent is ultimately irrelevant. The Act proscribes certain *conduct* and gives the Board authority to remedy such conduct. The Act does not, and cannot, proscribe *intent*, and the Board has no authority to fashion a remedy for such. Accordingly, the only way for the General Counsel to establish a violation in these circumstances is to show that Raybon was constructively discharged by Respondent. The General Counsel makes such attempt, but not before disingenuously arguing that Respondent, really, truly fired Raybon, even though Respondent never got the chance to do so before she resigned.[63]

In order to establish a constructive discharge, the General Counsel must prove that Respondent made conditions so onerous for Raybon, as a result of her protected activity, that she was forced to resign, or show that she was offered a "Hobson's choice" between continued employment or abandoning Section 7 protected activities. *Yellow Ambulance Service*, 342 NLRB 804, 807 (2004); *Kosher Plaza Supermarket*, 313 NLRB 74, 87 (1993); *Intercon I (Zercom)*, 333 NLRB 223, 223 fn. 4 (2001). The General Counsel asserts that during the February 25 telephonic meeting between Raybon, Schilling and Miller, Schilling, told Raybon that in light of her accusing Smith of being a racist, Smith was no longer willing to work with her. Schilling then asked, "what I am supposed to do?," which prompted Raybon to resign. According to the General Counsel, this question by Schilling conveyed to Raybon that there was no work left for her in the Arizona Chapter, thus reducing her hours to zero, and that such reduction of hours was so onerous that she was forced to resign. The problem with this

[62] It could be argued that Raybon's calling Smith a racist, while in the course of engaging in protected activity (if such were the case), could bring this matter into the analytical fold of *Burnup & Sims*, 379 U.S. 21 (1964), an analytical framework not raised by the General Counsel or Respondent. Under *Burnup & Sims*, the General Counsel must first establish that the discharged employee was engaged in protected activity, and that the alleged "misconduct" for which that employee was discharged occurred during the course of such protected activity. Thus, if such alleged misconduct is part of the res gestae of the employees' protected activity, the employer's motive is not at issue—and therefore *Wright Line* is not the proper analytical framework. Once the General Counsel meets this burden, the burden switches to the employer to show that it had a good faith belief that the employee engaged in misconduct in the course of his protected activity. If this burden is satisfied, the burden moves back to the General Counsel to establish that the misconduct did not, in fact occur. I have concluded, however, that Raybon was not engaged in protected activity. In any event, even under the *Burnup & Sims* framework I would conclude that Respondent has established that Raybon was engaged in misconduct by calling Smith a racist.

[63] This effort once again shows the General Counsel attempting to force a square peg into a round hole when the facts do not favor its theories of a violation.

argument, other that it makes no sense (again, forcing the square peg in the round hole. . .) is that Raybon testified that she resigned because she feared she was going to be fired, and was trying to salvage her professional reputation, which would have been harmed by the news of her firing. Thus, Raybon was not resigning because her working conditions had suddenly become onerous, or because she was presented with the choice between continued employment or abandoning protected activity, but rather she was resigning to preserve her professional reputation from perceived *potential* harm. Such choice does not fit under the Board's definition of a true Hobson's Choice, and does not support an argument for constructive discharge.[64] Accordingly, I conclude that Raybon was not constructively discharged—she resigned on her own volition.

In light of the above, I find that the General Counsel failed, on multiple grounds, to sustain its burden of proof under *Wright Line*, and therefore conclude that its allegation(s) with regards to Raybon's discharge do not have merit and should be dismissed.

D. The Allegations that Respondent Attempted to Interfere with or Undermine Raybon's Professional Reputation[65]

With regard to these allegations, the General Counsel asserts that Respondent violated the Act by:

- Sending copies of Raybon's social media posts to her clients (AASTO) in order to interfere with Raybon's relationship with that client;
- Excluding Raybon from professional meetings and deliberations in order to diminish her professional standing;
- Refusing to work with Raybon in her professional capacity in order to interfere with her relationship with AASTO and diminish her standing with coalition partners.

There is a myriad of fundamental problems with the above allegations, both from the factual standpoint, the burden of proof standpoint, and from the legal—and constitutional—standpoint. First, from the factual standpoint, the record shows, for example, that in August, Smith sent not only AASTO but also a number of the other coalition partners copies of tweets that Raybon had posted. These tweets essentially praised Arizona School Superintendent Hoffman, who was seen by Smith, AFC and other coalition partners as a political opponent who stood against many of the programs, policies and legislative goals of the coalition. I credited Smith's testimony that he was concerned about including Raybon in coalition discussions about strategy to advance legislation that Hoffman, and by extension, Raybon, opposed. His intent was

[64] As for the General Counsel's argument that Schilling's question "what am I supposed to do" amounted to an effective termination, I completely disagree. In this situation, it was Raybon's turn to place the ball back on Schilling's court, and to force his hand. She could have done so by simply saying that this was his decision to make—or more pointedly, in keeping with her professed beliefs, by saying that he could fire Smith, because there was no room in AFC for racists. This, of course, would not likely have resulted in Respondent changing its mind of its intention to discharge her, but would have allowed Raybon, after she was informed that she was being terminated, to offer her resignation instead in order to protect her interests. At such point, even if Respondent afforded her the option to resign instead of being fired, the constructive discharge theory would have been viable, because the discharge would have been official in the absence of a resignation.

[65] Complaint allegations 4(k); (l); and (m), respectively.

thus to alert the coalition about Raybon's possible conflict of interest, not to "interfere" with Raybon's relationship with her (new) employer, AASTO. Regarding the second bullet point above, the record shows that the emails chains inviting members of the coalition to different events or meetings originated not with Smith or AFC, but from others who were the original hosts. The General Counsel, in essence, suggests that either Smith, AFC or both, somehow persuaded the hosts not to invite Raybon to these meetings. Such speculation is simply not supported by the evidence—more than mere conjecture is needed for the General Counsel to meet its burden of proof. While it is true that Smith admitted informing the other members of the coalition that he would not participate in any legislative *strategy* meetings with Raybon (for the reasons explained above), this does not establish, by the preponderance of the evidence, that this was *the* reason the hosts failed to invite Raybon. Finally, regarding the final allegation (in the third bullet point, above), the record does not support a finding that Smith (or AFC) refused to work with Raybon altogether. To the contrary, the record shows that Smith (and AFC) has worked, and continues to work, with Raybon on a number of issues where they share common ground and goals. It is in legislative goal strategy sessions, where Raybon and AFC appear to have different goals, that Smith has declined to participate with her in.

Thus, these facts undermine the General Counsel's allegations, and the lack of factual support for its allegations alone would appear to doom the General Counsel's case. From the legal standpoint, the General Counsel's case grows more dubious. Thus, even assuming the facts to be as the General Counsel alleges, there are fundamental legal flaws that prove fatal to the General Counsel's allegations. In this regard, it is no mystery that the General Counsel failed to cite a single Board or court case in support of these allegations. This is because there are none, and for a good reason: there are fundamental constitutional constraints that prevent the Board from forcing Respondent, or any other entity or individuals, such as the coalition, for example, to associate with others they do not want to associate with, in order to remedy a potential unfair labor practice.

In essence, the complaint seeks to make unlawful Respondent's refusal to invite Raybon to meetings of a coalition it belonged to, or its refusal to participate in meetings of this coalition if Raybon was present. Under the First Amendment, however, individuals and entities have a fundamental right of expressive association, which is the right to associate or refuse to associate with others without governmental intrusion. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). This right is not absolute, of course, as the government may infringe on it when it has a compelling interest in preventing certain unlawful practices, such as sex or race discrimination. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). Thus, a balancing act is called for, weighing a fundamental constitutional right versus the government's interest in preventing unlawful conduct. Without engaging in a lengthy and perhaps unnecessary constitutional analysis, however, I simply cannot see how the Board's interest in preventing *possible* retaliatory conduct by Respondent, can outweigh Respondent's fundamental constitutional right—and that of the other coalition members—not to associate with Raybon by not inviting her to their meetings, or of refusing to participate in those meetings if she is invited. This is particularly true in light of the fact that as described above, the evidence of a retaliatory motive is weak, and mostly circumstantial. Thus, there is no compelling government interest here that would outweigh the constitutional constraints in question. In the final analysis, this constitutional question can be avoided altogether by applying the *Wright Line* analysis to this

situation, since it is applicable to alleged violations of Section 8(a)(4) & (1).[66] I conclude that the General Counsel has not met its burden of proof under such analytical framework, inasmuch it has not established, by a preponderance of the evidence, that Raybon's exclusion from the coalition's meetings was either caused by Respondent, or motivated by animus as a result of her protected activity. Moreover, even assuming that General Counsel had met such threshold (an extremely generous assumption), it failed to satisfy the last factor required by *Wright Line*, which is to show that the employer took an adverse action that actually harmed the employee. In this regard, the General Counsel has utterly failed to introduce any significant, let alone persuasive, evidence that Raybon (or her "professional standing," as alleged in the complaint) was in fact harmed by Respondent's alleged conduct. The only evidence proffered by the General Counsel in this regard was Raybon's testimony that she has not been invited to meetings of the "coalition," that she "felt" that it was because of Smith, and that this has "impacted" her ability to do her job.[67] Nothing more. This testimony is inherently insufficient to meet the General Counsel's burden of proof under the *Wright Line* analytical framework. Indeed, based on the allegations of the complaint, it appears that the General Counsel believes that *intent* to cause harm, assuming it has even established that, is actionable and subject to remedy under the Act. Nothing in the Act proscribes intent, however, nor gives the Board the authority to remedy such; only certain *conduct* is proscribed, conduct that results in adverse consequences, and it is such conduct that the Board may remedy under Section 10(a). No adverse consequences or harm has been established in this instance.

Accordingly, and for the above reasons, I find that these allegations lack merit and should be dismissed.

CONCLUSIONS OF LAW

1. American Federation For Children, Inc. (Respondent or AFC) (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining the overly broad "Confidentiality" clause in its Employee Handbook, as described above.

3. Respondent additionally violated Section 8(a)(1) of the Act by promulgating and maintaining the overly broad "Solicitation and Distribution of Literature" clause in its Employee Handbook, as described above.

4. Respondent did not otherwise violate the Act as alleged in the complaint.

5. The unfair labor practices committed by Respondent, as described above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

[66] Nonetheless, I believe the constitutional question needed to be mentioned, lest the General Counsel make allegations with such import in a cavalier fashion.
[67] See, Tr. 607-608.

REMEDY

The appropriate remedy for the Section 8(a)(1) violations I have found is an order requiring Respondent to cease and desist from such conduct and take certain affirmative action consistent with the policies and purposes of the Act.

Specifically, the Respondent will be required to cease and desist from promulgating or maintaining a confidentiality rule in its employee handbook that employees would reasonably interpret as requiring them to refrain from discussing wages, hours or working conditions with third parties without first obtaining the approval from Respondent; and shall additionally cease and desist from promulgating or maintaining a rule in its employee handbook that prohibits solicitation or distribution during "working hours."

Respondent shall also cease and desist, in any other manner, from interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Employer's Washington, DC facility, or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since [date of first unfair labor practice] When the notice is issued to the Employer, it shall sign it or otherwise notify Region 28 of the Board what action it will take with respect to this decision.

Accordingly, based on the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[68]

ORDER

Respondent, American Federation For Children, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

   (a) Engaging in any of the conduct described immediately above in the remedy section of this decision;

[68] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any other like or related manner interfering with, restraining, or coercing employees in their exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Rescind the confidentiality and distribution and solicitation of literature provisions of its employee handbook or revise them in all its forms to make clear that employees may discuss wages, hours and working conditions with third parties without seeking permission from Respondent, and may solicit and distribute literature during times other than working time.

(b) Within 14 days after service by the Region, post its Washington DC facility and other locations where notices to employees are customarily posted, copies of the attached notice marked "Appendix."[69] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 16, 2019.

[69] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director for Region 28, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington D.C. August 11, 2021

Ariel L. Sotolongo
Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

In recognition of these rights, we hereby notify employees that:

WE WILL NOT maintain the following rules in our employee handbook:

- a **Confidentiality** rule requiring employees to "maintain the confidentiality of AFC's internal affairs" and providing that "[i]nformation on […] personnel matters shall not be shared with anyone not employed by AFC, unless authorized by the President;" or

- a **Solicitations and Distribution of Literature** rule that interferes with your right to engage in solicitation in furtherance of the above rights during non-working time or in non-working areas or to distribute literature in furtherance of the above rights during non-working time and in non-working areas

WE WILL NOT in any like or related matter interfere with, restrain, or coerce you in the exercise of rights listed above.

AMERICAN FEDERATION FOR CHILDREN, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under

the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

National Labor Relations Board, Subregion 36
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-246878 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (602) 416-4755.